

AGREEMENT  
BETWEEN THE DEPARTMENT OF THE ARMY  
AND  
THE COMMONWEALTH OF VIRGINIA  
AND  
THE STATE OF NORTH CAROLINA  
FOR THE  
JOHN H. KERR DAM AND RESERVOIR  
SECTION 216 FEASIBILITY STUDY

THIS AGREEMENT is entered into this 17<sup>th</sup> day, of June, 2003, by and between the Department of the Army (hereinafter the "Government"), represented by the U.S. Army Engineer, Wilmington District (hereinafter the "District Engineer"), and the Commonwealth of Virginia, represented by the Deputy Secretary of Natural Resources and the State of North Carolina, represented by the Secretary, Department of Environment and Natural Resources (hereinafter the "Sponsors").

WITNESSETH, that

WHEREAS, the Congress has authorized the Secretary of the Army, acting through the Chief of Engineers, to review the operation of projects constructed by the Corps of Engineers for navigation, flood control, water supply, and related purposes when found advisable due to significantly changed physical, economic or environmental conditions, and to report to Congress with recommendations on the advisability of modifying the structures or their operation, pursuant to the authority provided by Section 216 of the River and Harbor and Flood Control Act of 1970, Public Law 91-611; and

WHEREAS, the Government has conducted a reconnaissance study of the operations of the John H. Kerr Dam and Reservoir and the effects to the Lower Roanoke River Basin pursuant to this authority, and has determined that further study in the nature of a "Feasibility Phase Study" (hereinafter the "Study") is required to fulfill the intent of the study authority and to assess the extent of the Federal interest in participating in a solution to the identified problems; and

WHEREAS, Section 105 of the Water Resources Development Act of 1986, Public Law 99-662, as amended, specifies the cost sharing requirements applicable to the Study; and

WHEREAS, the Sponsors have the authority and capability to furnish the cooperation hereinafter set forth and are willing to participate in study cost sharing and financing in accordance with the terms of this Agreement; and

WHEREAS, the Sponsors and the Government understand that entering into this Agreement in no way obligates any party to implement a project and that whether the Government supports a project authorization and budgets it for implementation depends upon, among other things, the outcome of the Study and whether the proposed solution is consistent with the Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies and with the budget priorities of the Administration.

NOW THEREFORE, the parties agree as follows:

## ARTICLE I - DEFINITIONS

For the purposes of this Agreement:

A. The term "Study Costs" shall mean all disbursements by the Government pursuant to this Agreement, from Federal appropriations or from funds made available to the Government by the Sponsors, and all negotiated costs of work performed by the Sponsors pursuant to this Agreement. Study Costs shall include, but not be limited to: labor charges; direct costs; overhead expenses; supervision and administration costs; the costs of participation in Study Management and Coordination in accordance with Article IV of this Agreement; the costs of contracts with third parties, including termination or suspension charges; and any termination or suspension costs (ordinarily defined as those costs necessary to terminate ongoing contracts or obligations and to properly safeguard the work already accomplished) associated with this Agreement.

B. The term "estimated Study Costs" shall mean the estimated cost of performing the Study as of the effective date of this Agreement, as specified in Article III.A. of this Agreement.

C. The term "excess Study Costs" shall mean Study Costs that exceed the estimated Study Costs and that do not result from mutual agreement of the parties, a change in Federal law that increases the cost of the Study, or a change in the scope of the Study requested by the Sponsors.

D. The term "Study Period" shall mean the time period for conducting the Study, commencing with the release to the U.S. Army Corps of Engineers, Wilmington District of initial Federal feasibility funds following the execution of this Agreement and ending when the Assistant Secretary of the Army (Civil Works) submits the feasibility report to the Office of Management and Budget (OMB) for review for consistency with the policies and programs of the President.

E. The term "PMP" shall mean the Project Management Plan, which is attached to this Agreement and which shall not be considered binding on any party and is subject to change by the Government, in consultation with the Sponsors.

F. The term "negotiated costs" shall mean the costs of in-kind services to be provided by the Sponsors in accordance with the PMP.

G. The term "fiscal year" shall mean one fiscal year of the Government. The Government fiscal year begins on October 1 and ends on September 30.

## ARTICLE II - OBLIGATIONS OF PARTIES

A. The Government, using funds and in-kind services provided by the Sponsors and funds appropriated by the Congress of the United States, shall expeditiously prosecute and complete the Study, in accordance with the provisions of this Agreement and Federal laws, regulations, and policies.

B. In accordance with this Article and Articles III.A., III.B. and III.C. of this Agreement, the Sponsors shall contribute cash and in-kind services equal to fifty (50) percent of Study Costs other than excess Study Costs. The Sponsors may, consistent with applicable law and regulations, contribute up to 50 percent of Study Costs through the provision of in-kind services. The in-kind services to be provided by the Sponsors, the estimated negotiated costs for those services, and the estimated schedule under which those services are to be provided are specified in the PMP. Negotiated costs shall be subject to an audit by the Government to determine reasonableness, allocability, and allowability.

C. The Sponsors shall pay a fifty (50) percent share of excess Study Costs in accordance with Article III.D. of this Agreement.

D. The Sponsors understand that the schedule of work may require the Sponsors to provide cash or in-kind services at a rate that may result in the Sponsors temporarily diverging from the obligations concerning cash and in-kind services specified in paragraph B. of this Article. Such temporary divergences shall be identified in the quarterly reports provided for in Article III.A. of this Agreement and shall not alter the obligations concerning costs and services specified in paragraph B. of this Article or the obligations concerning payment specified in Article III of this Agreement.

E. If, upon the award of any contract or the performance of any in-house work for the Study by the Government or the Sponsors, cumulative financial obligations of the Government and the Sponsors would result in excess Study Costs, the Government and the Sponsors agree to defer award of that and all subsequent contracts, and performance of that and all subsequent in-house work, for the Study until the Government and the Sponsors agree to proceed. Should the Government and the Sponsors require time to arrive at a decision, this Agreement shall be suspended in accordance with Article X of this Agreement, for a period of not to exceed six months. In the event the Government and the Sponsors have not reached an agreement to proceed by the end of their 6 month period, this Agreement may be subject to termination in accordance with Article X of this Agreement.

F. No Federal funds may be used to meet the Sponsors' share of Study Costs unless the Federal granting agency verifies in writing that the expenditure of such funds is expressly authorized by statute.

G. The award and management of any contract with a third party in furtherance of this Agreement which obligates Federal appropriations shall be exclusively within the control of the Government. The award and management of any contract by the Sponsors with a third party in furtherance of this Agreement which obligates funds of the Sponsors and does not obligate Federal appropriations shall be exclusively within the control of the Sponsors, but shall be subject to applicable Federal laws and regulations.

### ARTICLE III - METHOD OF PAYMENT

A. The Government shall maintain current records of contributions provided by the parties, current projections of Study Costs, current projections of each party's share of Study Costs, and current projections of the amount of Study Costs that will result in excess Study Costs. At least quarterly, the Government shall provide the Sponsors a report setting forth this information. As of the effective date of this Agreement,

estimated Study Costs are \$3,000,000 and the Sponsors' share of estimated Study Costs is \$1,500,000. The dollar amounts set forth in this Article are based upon the Government's best estimates, which reflect the scope of the study described in the PMP, projected costs, price-level changes, and anticipated inflation. Such cost estimates are subject to adjustment by the Government and are not to be construed as the total financial responsibilities of the Government and the Sponsors.

B. The Sponsors shall provide their cash contribution required under Article II.B. of this Agreement in accordance with the following provisions:

1. For purposes of budget planning, the Government shall notify the Sponsors by August 1 of each year of the estimated funds that will be required from the Sponsors to meet the Sponsors' share of Study Costs for the upcoming fiscal year.

2. No later than 30 calendar days prior to the scheduled date for the Government's issuance of the solicitation for the first contract for the Study or for the Government's anticipated first significant in-house expenditure for the Study, the Government shall notify the Sponsors in writing of the funds the Government determines to be required from the Sponsors to meet their share of Study Costs for the remainder of the first fiscal year. No later than 15 calendar days thereafter, the Sponsors shall provide the Government the full amount of the required funds by delivering a check payable to "FAO, USAED, Wilmington " to the District Engineer or verifying to the satisfaction of the Government that the Sponsors have deposited the required funds in an escrow or other account acceptable to the Government, with interest accruing to the Sponsors or presenting the Government with an irrevocable letter of credit acceptable to the Government for the required funds or providing an Electronic Funds Transfer in accordance with procedures established by the Government.

3. For the second and subsequent fiscal years of the Study, the Government shall, no later than 60 calendar days prior to the beginning of such fiscal year, notify the Sponsors in writing of the funds the Government determines to be required from the Sponsors to meet their required share of Study Costs for that fiscal year, taking into account any temporary divergences identified under Article II.D. of this Agreement. No later than 30 calendar days prior to the beginning of such fiscal year, the Sponsors shall make the full amount of the required funds available to the Government through any of the payment mechanisms specified in paragraph B.2. of this Article.

4. The Government shall draw from the funds provided by the Sponsors such sums as the Government deems necessary to cover the Sponsors' share of contractual and in-house financial obligations attributable to the Study as they are incurred.

5. In the event the Government determines that the Sponsors must provide additional funds to meet their share of Study Costs, the Government shall so notify the Sponsors in writing. No later than 60 calendar days after receipt of such notice, the Sponsors shall make the full amount of the additional required funds available through any of the payment mechanisms specified in paragraph B.2. of this Article.

C. Within ninety (90) days after the conclusion of the Study Period or termination of this Agreement, the Government shall conduct a final accounting of Study Costs, including disbursements by the Government of Federal funds, cash contributions by the Sponsors, the amount of any excess Study Costs, and credits for the negotiated

costs of the Sponsors, and shall furnish the Sponsors with the results of this accounting. Within thirty (30) days thereafter, the Government, subject to the availability of funds, shall reimburse the Sponsors for the excess, if any, of cash contributions and credits given over their required share of Study Costs, other than excess Study Costs, or the Sponsors shall provide the Government any cash contributions required for the Sponsors to meet their required share of Study Costs other than excess Study Costs.

D. The Sponsors shall provide their cash contribution for excess Study Costs as required under Article II.C. of this Agreement by either: delivering a check payable to "FAO, USAED, Wilmington" to the District Engineer; or providing an Electronic Funds Transfer in accordance with procedures established by the Government; as follows:

1. After the project that is the subject of this Study has been authorized for construction, no later than the date on which a Project Cooperation Agreement is entered into for the project; or

2. In the event the project that is the subject of this Study is not authorized for construction by a date that is no later than 5 years after the date of the final report of the Chief of Engineers concerning the project, or by a date that is no later than 2 years after the date of the termination of the Study, the Sponsors shall pay their share of excess Study Costs on such date either 5 years after the date of the final report of the Chief of Engineers or 2 years after the date of the termination of the study.

#### ARTICLE IV - STUDY MANAGEMENT AND COORDINATION

A. To provide for consistent and effective communication, the Sponsors and the Government shall appoint named senior representatives to an Executive Committee. Thereafter, the Executive Committee shall meet regularly until the end of the Study Period.

B. Until the end of the Study Period, the Executive Committee shall generally oversee the Study consistently with the PMP.

C. The Executive Committee may make recommendations that it deems warranted to the District Engineer on matters that it oversees, including suggestions to avoid potential sources of dispute. The Government in good faith shall consider such recommendations. The Government has the discretion to accept, reject, or modify the Executive Committee's recommendations.

D. The Executive Committee shall appoint representatives to serve on a Study Management Team. The Study Management Team shall keep the Executive Committee informed of the progress of the Study and of significant pending issues and actions, and shall prepare periodic reports on the progress of all work items identified in the PMP.

E. The costs of participation in the Executive Committee (including the cost to serve on the Study Management Team) shall be included in Study Costs and shared in accordance with the provisions of this Agreement.

## ARTICLE V – DISPUTE RESOLUTION

As a condition precedent to a party bringing any suit for breach of this Agreement, that party must first notify the other parties in writing of the nature of the purported breach and seek in good faith to resolve the dispute through negotiation. If the parties cannot resolve the dispute through negotiation, they may agree to a mutually acceptable method of non-binding alternative dispute resolution with a qualified third party acceptable to all parties. The parties participating in the non-binding alternative dispute resolution shall each pay an equal share of any costs for the services provided by such a third party as such costs are incurred. Such costs shall not be included in Study Costs. The existence of a dispute shall not excuse the parties from performance pursuant to this Agreement.

## ARTICLE VI - MAINTENANCE OF RECORDS

A. Within 60 days of the effective date of this Agreement, the Government and the Sponsors shall develop procedures for keeping books, records, documents, and other evidence pertaining to costs and expenses incurred pursuant to this Agreement to the extent and in such detail as will properly reflect Study Costs. These procedures shall incorporate, and apply as appropriate, the standards for financial management systems set forth in the Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments at 32 C.F.R. Section 33.20. The Government and the Sponsors shall maintain such books, records, documents, and other evidence in accordance with these procedures for a minimum of three years after completion of the Study and resolution of all relevant claims arising therefrom. To the extent permitted under applicable Federal laws and regulations, the Government and the Sponsors shall each allow the other to inspect such books, documents, records, and other evidence.

B. In accordance with 31 U.S.C. Section 7503, the Government may conduct audits in addition to any audit that the Sponsors are required to conduct under the Single Audit Act Amendments of 1996, 31 U.S.C. Sections 7501-7507. Any such Government audits shall be conducted in accordance with Government Auditing Standards and the cost principles in OMB Circular No. A-87 and other applicable cost principles and regulations. The costs of Government audits shall be included in Study Costs and shared in accordance with the provisions of this Agreement.

## ARTICLE VII - RELATIONSHIP OF PARTIES

The Government and the Sponsors act in independent capacities in the performance of their respective rights and obligations under this Agreement, and neither is to be considered the officer, agent, or employee of the other.

## ARTICLE VIII - OFFICIALS NOT TO BENEFIT

No member of or delegate to the Congress, nor any resident commissioner, shall be admitted to any share or part of this Agreement, or to any benefit that may arise therefrom.

## ARTICLE IX - FEDERAL AND STATE LAWS

In the exercise of the Sponsors' rights and obligations under this Agreement, the Sponsors agree to comply with all applicable Federal and State laws and regulations, including Section 601 of Title VI of the Civil Rights Act of 1964 (Public Law 88-352) and Department of Defense Directive 5500.11 issued pursuant thereto and published in 32 C.F.R. Part 195, as well as Army Regulation 600-7, entitled "Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or Conducted by the Department of the Army".

## ARTICLE X - TERMINATION OR SUSPENSION

A. This Agreement shall terminate at the conclusion of the Study Period, and neither the Government nor the Sponsors shall have any further obligations hereunder, except as provided in Article III.C. of this Agreement; provided, that prior to such time and upon thirty (30) days written notice, any party may terminate or suspend this Agreement. In addition, the Government shall terminate this Agreement immediately upon any failure of the parties to agree to extend the study under Article II.E. of this Agreement, or upon the failure of the Sponsors to fulfill their obligation under Article III of this Agreement. In the event that any party elects to terminate this Agreement, the parties shall conclude their activities relating to the Study and proceed to a final accounting in accordance with Article III.C. and III.D. of this Agreement. Upon termination of this Agreement, all data and information generated as part of the Study shall be made available to all parties.

B. Any termination of this Agreement shall not relieve the parties of liability for any obligations previously incurred, including the costs of closing out or transferring any existing contracts.

C. In the event that either of the Sponsors elect to terminate its own responsibilities under this Agreement, and the remaining Sponsor elects to continue to participate in the Study, the Government shall negotiate in good faith with the remaining Sponsor to effect a timely and productive conclusion to that portion of the Study pertaining to the remaining Sponsor's area of statutory authority. The Government shall prepare a revised PMP and revised estimated Study Costs, including the remaining Sponsor's share, to complete that portion of the Study of interest to the remaining Sponsor. If the remaining Sponsor elects to complete the Study, this Agreement shall be amended to reflect the negotiated revisions to the PMP and Study Costs. Cost amendments to this Agreement made pursuant to this paragraph shall reflect credits for the previous cash and in-kind contributions of all Study Sponsors and shall reflect task reductions made as a result of withdrawal of any Study Sponsor.

## ARTICLE XI – NOTICES

A. Any notice, request, demand, or other communication required or permitted to be given under this Agreement shall be deemed to have been duly given if in writing and either delivered personally or by telegram or mailed by first-class, registered, or certified mail, as follows:

If to the Commonwealth of Virginia: David K. Paylor, Deputy Secretary  
of Natural Resources  
P.O. Box 1475  
Richmond, Virginia 23218

If to the State of North Carolina: John N. Morris, Director  
NC Division of Water Resources  
1611 Mail Service Center  
Raleigh, NC 27699-1611

If to the Government: Charles R. Alexander, Colonel  
U.S. Army Corps of Engineers  
P.O. Box 1890  
Wilmington, NC 28402-1890

B. A party may change the address to which such communications are to be directed by giving written notice to the other party in the manner provided in this Article.

C. Any notice, request, demand, or other communication made pursuant to this Article shall be deemed to have been received by the addressee at the earlier of such time as it is actually received or seven calendar days after it is mailed.

## ARTICLE XII – OBLIGATION OF FUTURE APPROPRIATIONS

A. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the General Assembly of the Commonwealth of Virginia, where creating such an obligation would be inconsistent with the Constitution or the statutory limitations of the Commonwealth of Virginia.

B. Nothing herein shall constitute, nor be deemed to constitute, an obligation of future appropriations by the General Assembly of the State of North Carolina, where creating such an obligation would be inconsistent with the Constitution of the State of North Carolina.

C. The Sponsors intend to satisfy their obligations under this Agreement. The Sponsors shall include in their budget requests or otherwise propose, for each fiscal period, appropriations sufficient to cover the Sponsors' obligations under this Agreement for each year, and will use all reasonable and lawful means to secure the appropriations for that year sufficient to make the payments necessary to fulfill their obligations hereunder. The Sponsors reasonably believe that funds in amounts sufficient to discharge these obligations can and will lawfully be appropriated and made available for this purpose. In the event the budget or other means of appropriations does not provide funds in sufficient amounts to discharge these obligations, the Sponsors shall use their best efforts to satisfy any requirements for payments under this Agreement from any other source of funds legally available for this purpose. Further, if the Sponsors are unable to satisfy their obligations hereunder, the Government may exercise any legal rights it has to protect the Government's interests related to this Agreement.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, which shall become effective upon the date it is signed by the District Engineer.

DEPARTMENT OF THE ARMY

COMMONWEALTH OF VIRGINIA

BY: 

Charles R. Alexander, Jr.  
Colonel, Corps of Engineers  
District Engineer  
Wilmington District

DATE: 6/17/03

BY: 

David R. Paylor  
Deputy Secretary of Natural Resources

DATE: 6-10-2003

STATE OF NORTH CAROLINA

BY: 

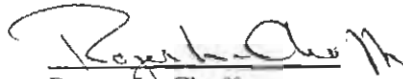
William G. Ross, Jr.  
Secretary, Department of Environment  
and Natural Resources

DATE: 5-22-03

## CERTIFICATE OF AUTHORITY

I, Roger L. Chaffe, do hereby certify that I am authorized by the principal legal officer of the Commonwealth of Virginia to make this certification; that the Commonwealth of Virginia is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army, the Commonwealth of Virginia, and the State of North Carolina in connection with a study of the John H. Kerr Dam and Reservoir; and that the persons who have executed this Agreement on behalf of the Commonwealth of Virginia have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this  
9th day of June, 2003.

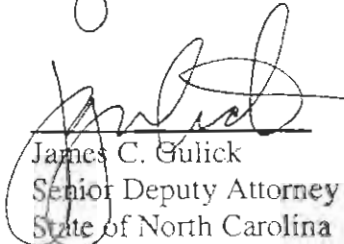


Roger L. Chaffe  
Senior Assistant Attorney General  
Commonwealth of Virginia

# CERTIFICATE OF AUTHORITY

I, James C. Gulick, do hereby certify that I am authorized by the principal legal officer of the State of North Carolina to make this certification; that the State of North Carolina is a legally constituted public body with full authority and legal capability to perform the terms of the Agreement between the Department of the Army, the Commonwealth of Virginia, and the State of North Carolina in connection with a study of the John H. Kerr Dam and Reservoir; and that the persons who have executed this Agreement on behalf of the State of North Carolina have acted within their statutory authority.

IN WITNESS WHEREOF, I have made and executed this certification this  
22<sup>d</sup> day of May, 2003.

  
James C. Gulick  
Senior Deputy Attorney General  
State of North Carolina

## CERTIFICATION REGARDING LOBBYING

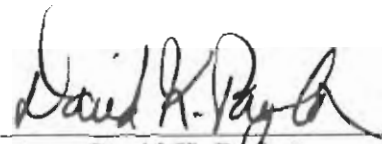
The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.



David K. Paylor  
Commonwealth of Virginia  
Deputy Secretary of Natural Resources

DATE: 6-10-03

## CERTIFICATION REGARDING LOBBYING

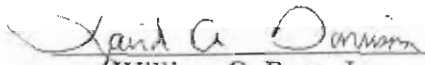
The undersigned certifies, to the best of his or her knowledge and belief that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by Section 1352, Title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

  
William G. Ross, Jr.  
State of North Carolina  
Secretary, Department of Environment and Natural Resources

DIRECTOR  
DIV. OF PURCHASE AND SERVICES

DATE: 5-22-03